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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NO.....

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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NEW YORK LIFE INSURANCE COMPANY,
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STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of
The United States:

Petitioner, New York Life Insurance Company, respectfully petitions your Honorable Court for a Writ of Certiorari to review the decision of the Circuit Court of Appeals of the Ninth Circuit rendered and filed June

28, 1937, on petitioner's appeal to that Court from the judgment of the District Court of the United States for the District of Montana made and entered November 18, 1935, in favor of respondent, Stella Jane Gamer, as Executrix of the will of Edward Walter Gamer, deceased, and against your petitioner, affirming said judgment, and represents as follows:

Petitioner issued to Edward W. Gamer its policy of insurance to take effect December 29, 1926, by which it agreed to pay to the executors, administrators or assigns of the Insured, Ten Thousand Dollars upon receipt of due proof of the death of said insured within seven years from the date the policy took effect, or Twenty Thousand Dollars if such death within the term period resulted from accident as defined under the "double indemnity" provisions therein set forth as follows:

> "The double indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury and within the term period. Double indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane. * * *" (9-10-11 R.)

The Insured died at Butte, Montana, April 10, 1933, as the result of a gun-shot wound,—the evidence showing that the muzzle of the rifle was in his mouth at the time it was discharged,—and thereafter and on or about May 8, 1933, Respondent furnished and delivered to Petitioner due proof of the death of said Insured (6R; 27 R, Par. 4),

and on or about June 9, 1933, petitioner tendered to respondent its check for $10,066.96, being the face of the policy plus an unpaid dividend and accumulated interest, in full settlement of all claims under the policy, which offer was refused (195-196-197 R), and said sum of money was by Petitioner deposited in court for Respondent.

On September 6, 1933, respondent commenced this action in the District Court of Silver Bow County, Montana, to recover from petitioner $20,000.00, with interest and costs, and the action was duly removed to the District Court of the United States for the District of Montana.

As a basis for her right of recovery, respondent alleged in her complaint:

> "That said Edward W. Gamer, the insured named in said policy of insurance, died at Butte, Montana, on the tenth day of April, 1933, and that the death of said insured Edward W. Gamer resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and * * * that the death of said insured did not result from self-destruction * * * (but) resulted directly from the accidental discharge of a fire-arm, to-wit: a rifle, the bullet from said rifle so accidentally discharged striking him and causing his death." (6 R.)

By its answer to said complaint, petitioner

> "Denies that the death of said Edward W. Gamer resulted directly or indirectly from the accidental discharge of a fire-arm, to-wit, a rifle, or any other fire-arm, and denies that any bullet from said alleged rifle, accidentally discharged, struck him or caused his death * * * and defendant alleges that the death of said E. Walter Gamer, also known

as Edward W. Gamer, resulted from self-destruction by means of intentionally discharging into his own body a certain bullet from a certain loaded rifle held in the hand or hands of himself with intention to take his own life and on the 10th day of April, 1933, the said Edward W. Game did take his own life." (27 R, 30 R.)

The only issue of fact presented by the pleadings is whether or not the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through accidental means, and not from self-destruction, whether sane or insane.

The action was tried in the District Court of the United States for the District of Montana before the Honorable George M. Bourquin, Judge, who directed a verdict for the petitioner, and from the judgment entered thereon the respondent appealed to the Circuit Court of Appeals of the Ninth Circuit, which Court (the Honorable Circuit Judge Wilbur and the Honorable Circuit Judge Denman sitting) reversed the judgment and directed a new trial, but stated in its opinion that the evidence leads "irresistibly to the conclusion that the muzzle of the gun was in the mouth of the deceased at the time the rifle was discharged." (76 F.-2nd-543-544.)

The case was again tried before the Honorable James H. Baldwin, Judge, and a jury, and at the close of all the evidence, petitioner moved the Court to direct the jury to return its verdict in favor of respondent and against petitioner for the sum of $10,066.96 (the amount tendered by petitioner to respondent and paid into court), and against respondent and in favor of petitioner upon the question of double indemnity, on the grounds and

for the reasons: (a) that respondent had failed to show that the death of E. Walter Gamer was caused by any accidental means; (b) that the evidence shows the death of E. Walter Gamer was caused by self-destruction, and (c) that the evidence will not sustain a verdict in favor of respondent and against petitioner under the double indemnity provision of the policy. The motion was denied and exception reserved and allowed (242 R.).

The jury returned its verdict in favor of respondent for $20,000.00, with interest from May 8, 1933, at 6% per annum, upon which verdict judgment was entered November 18, 1935. (35-36-37 R.)

The Court instructed the jury (253-274 R) that

(1) "In this case, the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight, of the evidence is upon the defendant. The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary." (257 R, Assigned as Error 293 R.)

(2) "Ordinarily, gentlemen of the jury, in the absence of a plea by the defendant of suicide or self-destruction, the burden would be upon, and it still is upon the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer in this case the New York Life Insurance Company has admitted that Walter Gamer died through external and violent means. So that question is out. The question remains as to whether the death was accidentally caused, or the means of death was accidental, or whether it was suicide. But when the defendant took the position that it takes here, it assumed the burden of

proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. Not that the rifle was in his hand at the time the bullet was discharged; not that it is possible that the bullet might have been discharged by accident, but they must show if they would avoid recovery here, to your satisfaction and by a preponderance of the evidence that Walter Gamer intentionally took his own life; not that he took it, but that at the time it was taken by him he intended to kill himself. Proof that Walter Gamer had that gun in his hand, proof that it was fired while it was in his hand, proof that as a result of the firing of that rifle he died, is not sufficient to sustain the defendant's contention. In addition to that, it must be shown that at that moment Walter Gamer intended that the bullet fired from that gun should take his life." (258 R. Assigned as Error, 293 R.)

(3) "The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary." (259 R. Assigned as Error, 295 R.)

(4) "Now, gentlemen of the jury, it seems to me that with this single issue presented here we come down to a single point and that is whether the evidence is sufficient to justify you in finding that Walter Gamer deliberately took his own life. As I told you in the beginning, the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you, that the presumption is not according to the fact. The rule is, as a matter of law, that even where, as in this case, there is direct evidence that the death was caused by a weapon in the hands of the deceased, the presumption against suicide still prevails, be-

cause if nothing more than that is shown there is still room for the hypothesis that his act in that regard may have been involuntary, and accidental. So, as I told you, the fact that Walter Gamer may, in your opinion, have had that gun in his hand, the fact that he may have been careless with it,—if we were not careless there would be no accidents. Carelessness is not a defense. There must be a deliberately formed intention on the part of Walter Gamer to kill himself. That is the only possible defense that the defendant in this case has under the pleadings and the proof." (263 R. Assigned as Error, 296 R.)

(5) "In conclusion, the question simmers down to simply this: Do you believe, after considering all the testimony in this case, that E. Walter Gamer deliberately destroyed himself? If you do, your verdict should be for the defendant so far as the double indemnity is concerned. If, on the other hand, the defendant has not removed from your mind the presumption which the law creates that E. Walter Gamer did not kill himself, then you should find your verdict for the plaintiff here for the full amount she claims, $20,000.00 with interest." (268 R. Assigned as Error, 300 R.)

To the above instructions, the defendant excepted as follows; and such exceptions were noted by the Court. (247 R.)

"The defendant excepts to the charge of the court that the burden is upon the defendant to prove that Walter Gamer intentionally took his own life, and that his death was not the result of accident or accidental means.

"The contract of insurance specifically provides that the defendant company shall be liable for double indemnity only in the event the death should be caused from bodily injury effected solely through external, violent and accidental means. And the burden is upon the plaintiff to prove that death was

caused by accidental means within the meaning of said contract of insurance, and that this embraces the fact that Walter Gamer did not take his own life and did not commit suicide whether then sane or insane, or whether then being capable, as a matter of law, of forming a fixed intention by reasoning or not. That the question of suicide in this case is not, as a matter of law, a question of defense, but is a question of substantive right to be first established (negatived) by the plaintiff before any recovery may be obtained by the plaintiff, and that the burden at no time shifts from the plaintiff to the defendant, but is upon the plaintiff throughout the entire case to prove by a preponderance of the evidence that Walter Gamer's death occurred through accidental means, whether sane or insane. (269-270 R.)

"The defendant objects to the charge and instruction of the court that there is a presumption in this case that Walter Gamer did not take his own life or did not commit suicide, for that under the facts in this case undisputed, the evidence will, as a matter of law, sustain but one conclusion and that is that Walter Gamer's death was not the result of accident but was the result of self-destruction." (270 R.)

"The defendant objects to the charge of the court in advising the jury that the burden is upon the defendant to show that E. Walter Gamer deliberately and intentionally took his own life; and in this connection states that the charge as given would lead the jury to believe that he must have been in such a state of mind that he could form an intent and that this may negative the contractual right of suicide, whether sane or insane." (272 R.)

An appeal was taken from said judgment by petitioner to the United States Circuit Court of Appeals for the Ninth Circuit, and a transcript of all the evidence and

proceedings filed in said Court of Appeals, and said cause was entered and docketed in said Court of Appeals, entitled

New York Life Insurance Company, a corporation,
Appellant,

vs.

Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, deceased,
Respondent,

and numbered 8124 on the Docket of said Court.

The Assignment of Errors filed in said cause and urged upon said appeal appears in the Transcript at pages 288 to 302, inclusive, and embraces the errors that

(a) The Court erred in overruling and denying the motion of the defendant New York Life Insurance Company for a directed verdict against plaintiff and in favor of defendant upon the question of double indemnity, for that the plaintiff failed to show that the death of E. Walter Gamer was caused by any accidental means; that the evidence shows that the death of E. Walter Gamer was caused by self-destruction, and the evidence will not sustain a verdict in favor of the plaintiff and against the defendant under the double indemnity provision of the policy. (Motion, ruling and exception, 242 R. Assignment 288 R.)

(b) The Court erred in instructing the jury as hereinabove set forth. (Exceptions 269 to 272 R., Assignment 293-300 R.)

Thereafter and on September 21, 1936, said cause came on to be heard in said Circuit Court of Appeals

before the Honorable Circuit Judge Wilbur, the Honorable Circuit Judge Garrecht, and the Honorable Circuit Judge Denman, and on June 28, 1937, the opinion of said Circuit Court was rendered and filed (R. 328), erroneously holding and deciding:

That the instructions herein complained of state the law;

That the burden of proving the death of the Insured was caused by suicide is upon the defendant;

That although plaintiff alleged accidental death and negatived death by suicide in her complaint, and defendant denied accidental death and alleged suicide, the burden of proving suicide is upon defendant because of such allegation;

That the presumption of law is that the death of Insured was not voluntary, and the burden is upon the defendant to overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary;

That the presumption of law that the death of Insured was not voluntary has the weight and effect of evidence, and does not vanish in the light of evidence tending to show the truth, but is to be considered by the jury with all other evidence in the case in arriving at their verdict;

That the Supreme Court of the United States recognizes in the law what is known as a "permanent" presumption and also a "vanishing" presumption, and that the presumption against suicide belongs to the class of permanent presumptions to be treated as evidence throughout the entire case;

That although "evidence was introduced from which the jury could infer that the special defense of suicide had been established," still the presumption against suicide is to be treated as evidence to the contrary, and is sufficient in itself to sustain the judgment;

> That the District Court did not err in overruling defendant's motion for a directed verdict; that the evidence is sufficient to sustain the judgment, and that the judgment of the District Court should be and is affirmed.

Said opinion is reported in 90 F. (2d) P..... and is found in the Transcript at page 328.

Pursuant to said opinion, and in accordance therewith, judgment of said Circuit Court of Appeals, affirming said judgment of said District Court, was filed and entered June 28, 1937, and appears in the Transcript at page 344.

Your petitioner is advised that said judgment of said Circuit Court of Appeals is final, and is erroneous, and that this Honorable Court should require the case to be certified to it for review and determination under the Act of Congress permitting such causes to be certified for revision.

JURISDICTION:

The Statute under which the jurisdiction of this Court is invoked is,

Sec. 240, Judicial Code, Amended; 28 USCA, Sec. 347, and provides, in substance, that

> In any case in a circuit court of appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

The Circuit Court of Appeals of the Ninth Circuit concedes that its opinion is in conflict with decisions of other circuit courts of appeal, but contends it is in accord with the decision of the Supreme Court of the United States in the McConkey case (127 U. S. 661), which is denied by petitioner, and admits that confusion exists as evidence by the opposing holdings of other circuit courts of appeal? (341 R.)

Where there is a conflict of decision upon the same question of law by different Federal Circuit Courts of Appeal, this Court will grant certiorari in order to secure uniformity of decision.

Gay v. Ruff, 292 U. S. 25, 54 S. Ct. 608, 78 L. Ed. 1099;

Greer v. United States, 245 U. S. 559, 38 S. Ct. 209, 62 L. Ed. 559;

Wright v. Vinton Branch of Mountain Trust Bank (Decided Mch. 29, 1937), 57 S. Ct. 556, 81 L. Ed. 487;

Wayne United Gas Co. v. Owens Illinois Glass Co. (Decided Feb. 1, 1937), 57 S. Ct. 382, 81 L. Ed. 300.

And especially is this true, where the decision below is alleged to conflict with principles established by decisions of this Court.

The Ansaldo San Giorgio v. Rheimstrom Bros. Co., 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016;

Rule 38, Sub. 5 (b) of this Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT:

1: The decision of said Court holding that the burden of proving that the death of the insured was caused by suicide is upon the defendant, conflicts with principles established by decisions of this Court, and of other circuit courts of appeal, and with the former decisions of said Ninth Circuit Court of Appeals.

2: The decision of said Court that the presumption of law is that the death of the insured was not voluntary, and the burden is upon defendant to overcome this presumption and satisfy the jury by a preponderance of evidence that his death was voluntary, conflicts with principles established by decisions of this Court, and of other circuit courts of appeal, and with the former decisions of said Ninth Circuit Court of Appeals.

3: The decision of said Court that the presumption of law that the death of insured was not voluntary has the weight and effect of evidence, and does not vanish in the light of evidence tending to show the fruth, but is to be considered by the jury with all other evidence in the case in arriving at their verdict, is in conflict with principles established by decisions of this Court, and of other circuit courts of appeal, and with the former decisions of said Ninth Circuit Court of Appeals.

4: The decision of said Court that the Supreme Court of the United States recognizes in the law what is known as a "permanent" presumption and also a "vanishing" presumption, and that the presumption against suicide belongs to the class of permanent presumptions to be treated as evidence throughout the entire case, is contrary to the decisions of the Supreme Court of the United States.

5: The decision of said Court that although "evidence was introduced from which the jury could infer that the special defense of suicide had been established," still the presumption against suicide is to be treated as evidence to the contrary, and is sufficient in itself to sustain a judgment, conflicts with decisions of this Court, and other Circuit Courts of Appeal, as well as with former decisions of the Circuit Court of Appeals of the Ninth Circuit.

6: The decision of said Circuit Court of Appeals that the District Court did not err in overruling defendant's motion for a directed verdict, and that the evidence is sufficient to sustain the judgment,—conflicts with decisions of the Supreme Court of the United States, and with the decisions of other Circuit Courts of Appeal.

AUTHORITIES SUSTAINING ABOVE REASONS:

In the opinion of the Court herein complained of, it is stated:

> "This distinction between 'vanishing' or temporary presumptions and permanent presumptions which 'prevail unless such (opposing) testimony is found to preponderate' places the Supreme Court as not in agreement with the strongly reasoned and historically fortified conclusions of Professor Wigmore and Professor Thayer. According to them there is, properly speaking, only one kind of presumption, the kind which 'vanishes' upon the going forward with the evidence to a point raising a contrary inference by the party against whom the presumption is raised. Wigmore, Evidence, Vol. 5, Sec. 2491; Thayer, Preliminary Treatise on Evidence, 339, 346." (R. 338.)

"Confusion now exists as evidenced by the opposing holdings of the Sixth, Eighth and Ninth Circuits as against those of the Fourth and Fifth Circuits. (341 R.)

"The Sixth and Eighth Circuits hold, with this circuit, that the McConkey case declares the law. * * *" (341 R.)

"The Fifth Circuit, without mentioning the McConkey decision, has held that the presumption against suicide does not cast the burden on the insurer * * *" (341 R.)

"The Fourth Circuit deems the McConkey case not to be the law and frankly accepts the views of Thayer and Wigmore. * * *" (341 R.)

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES:

In the case at bar, the contract of insurance provides that "the double indemnity provided for * * * shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means. * * * Double indemnity shall not be payable if the insured's death resulted from self-destruction, whether sane or insane." (9-10-11 R.)

The complaint alleges that death was caused by accidental means and not by suicide. (6 R.) The answer denies this, and alleges death was due to suicide. (27 R; 30 R.)

The Circuit Court of Appeals holds that because the defendant alleged in its answer that death resulted from

self-destruction, the burden is upon defendant to prove suicide, notwithstanding the terms of the contract of insurance, and the allegations of plaintiff that death was accidental and did not result from suicide, and relies upon Travelers' Insurance Co. v. McConkey, 127 U. S. 661, to sustain its decision.

The McConkey case clearly holds:

> "There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means."

Of course, proving death by accidental means necessarily negatives death by intentional means, or suicide.

This Court in the McConkey case further held that there is a presumption against suicide; it is contrary to the general conduct of mankind.

This presumption against suicide simply required the defendant to go forward with its evidence, for in the absence of any evidence to the contrary the presumption would prevail.

But there is not one word in the McConkey case which states or assumes that the presumption against suicide has the force and effect of evidence, or is to be considered by the court or jury after evidence is received tending to show the truth.

The following cases decided by this Court since the McConkey case clearly sustain these contentions:

In the case of Mobile, etc. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (commonly called the Turnipseed case), this Court, in construing a statute of

Mississippi making proof of injury inflicted by the running of locomotives or cars prima facie evidence of the want of reasonable care on the part of the servants of the company in reference to such injury, stated as follows:

> "We are not impressed with the argument that the Supreme Court of Mississippi, in construing the act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. *The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end,* and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law." (Italics supplied.)

In Western & A. R. R. v. Henderson, 279 U. S. 639, 49 Sup. Ct. 445, 73 L. Ed. 884, this Court had under consideration a statute of Georgia providing that a railroad company shall be liable for any damages done to persons or property by the running of the locomotives or cars, or for damage done to any person in the employ of the company, unless the company shall make it appear that their agents and servants have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

This Court said:

"A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. * * * The Mississippi statute (in the Turnipseed case) created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. * * * That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by Section 2780 (the Georgia statute under consideration) is unreasonable and arbitrary, and violates the due process clause of the Fourteenth Amendment."

The Circuit Court of Appeals of the Ninth Circuit in the case at bar states: (337 R.)

> "The Supreme Court in the McConkey case, supra, has decided, in a case identical with that at bar, that the presumption against suicide belongs to the class of permanent presumptions of the Henderson case, and not the vanishing presumption of the Turnipseed case. It squarely holds that it casts the burden of proof upon the insurer. This court is not in a position to hold either that the McConkey case has been overruled or that the law is left in a condition in which we may treat the question as one before us de novo." (337 R.)

It is respectfully submitted that the McConkey case is not subject to any such interpretation, and that the Turnipseed case recognizes the legal effect of an inference arising from a presumption which requires the opposing party to go forward with his evidence, and when some

evidence disputing the inference appears, the inference is at an end. The Henderson case approves the Turnipseed case, and holds the Georgia statute unconstitutional because it has the effect of creating "an inference that is given the effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate."

In Heiner, Collector, v. Donnan, 285 U. S. 312, 52 Sup. Ct. 358, 76 L. Ed. p. 772, the Government contended that the statute under consideration created a conclusive presumption and became a rule of substantive law, but this Court stated:

> "The earlier revenue act created a prima facie presumption, which was made irrebutable by the later act of 1926. A rebutable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof (citing Turnipseed case); and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and can not be made to, exist in actuality, and the result is the same, unless we are ready to overrule the Schlesinger case (270 U. S. 230), as we are not; for that case dealt with a conclusive presumption, and the court held it invalid without regard to the question of its technical characterization."

In Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 53 Sup. Ct. 249, 77 L. Ed. p. 457, a statute of South

Carolina was attacked upon the contention that the Supreme Court of that state by affirming the judgment, in effect construed the statute to mean that failure to give the prescribed signals is negligence per se and raised a presumption that such failure was the proximate cause of the collision and warranted recovery by plaintiff without further proof, *"and that such presumption does not vanish from the case upon the introduction of evidence by the railroad company, but remains throughout to be considered by the jury as evidence."* After stating the instructions of the State Court, this Court said: "The effect of the ruling of the trial court is that the South Carolina statute was comparable with that of Mississippi (Turnipseed case) and not that of Georgia (Henderson case). It must be supposed that the court, with this in mind, intended to charge the jury in accordance with the language which it had just quoted. True, the jury was not told in so many words that, where countervailing evidence has been put in, the presumption comes to an end, but we think this is the fair purport of the language. . . . Certainly, the charge contains no affirmative words *directing the jury in that event to consider the presumption as evidence to be weighed with other evidence in the case."* (Italics supplied.) . . . . "A reading of its opinion leaves no doubt that the State Supreme Court construed the statute as creating a presumption limited by the rule of the Turnipseed Case, . . . and considered the charge of the trial court as in harmony with that view,—namely, that *the legal effect of the presumption was to cast upon the railroad company the duty of producing some evidence to the contrary, whereupon the inference was at an end,* and the question became one for

the jury upon all of the evidence." (Italics supplied.)

The latest expression of the Supreme Court of the United States upon this subject is found in the case of Del Vecchio v. Bowers, 296 U. S. 280; 56 Sup. Ct. 190; 80 L. Ed. 229.

The Court said:

> "The relevant substantive section of the act directs that no compensation shall be payable if the injury was occasion by the willful intention of the employee to injure or kill himself; the adjective section creates a presumption that the injury was not so occasioned, in the absence of substantial evidence to the contrary. *The question is whether, as the court below thought, the presumption has the quality of affirmative evidence. The answer must be that it has not.*" (Italics supplied.)
>
> "When a trier of facts is to be persuaded of the truth of a disputed proposition, one or the other of the parties, the proponent or the opponent, has the burden of going forward with evidence. In the present instance, the fact that the wound was self-inflicted permits but one of two conclusions; either the decedent accidentally killed himself, or he committed suicide. Considerations of fairness and experience in human affairs induce fact-finding bodies, where there is a balance of probability, to adopt a working assumption as the basis of a conclusion, *unless and until facts are developed by evidence.* The natural love of life, the comparative infrequency of suicide as contrasted with accident, and the likelihood that testimony as to the cause of death would be more readily available to the employer than to the claimant justify a presumption, which the law indulges in such a case, that the death was accidental. The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that

the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this prima facies. The statement in the act that the evidence to overcome the effect of the presumption *must be substantial* adds nothing to the well-understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony *sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.* If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con." (Italics supplied.)

Decisions of Circuit Courts of Appeal:
(Fourth Circuit):

The case of Jefferson Standard Life Ins. Co. v. Clemmer, 79 Fed. (2d), 724, decided October 24, 1935, is a brief in itself upon these questions, and one of the ablest and most instructive cases to be found in the books.

The policy sued on was practically identical with the one involved in the case at bar.

The entire opinion is very instructive, but for the sake of brevity we quote the following portion only:

"These reflections lead us to adopt the sounder view that the presumption against suicide is *not evidence at all,* but is a rule of law which in a case of this kind requires the conclusion, in the event of an unexplained death by violent injury, that the death was not suicidal until credible evidence of self-

destruction is offered. When such evidence is offered, whether it be in the course of the plaintiff's proof or by the defendant, the presumption as a rule of law disappears from the case and the trier of facts passes upon the issues in the usual way. When unexplained death by violence is shown, a defendant who seeks to avoid liability on the ground of suicide has the burden of going forward with the evidence or the issue of suicide will go against him, but if he offers such evidence, the burden of persuading the jury that death resulted from accident independent of suicide and all other causes remains with the plaintiff, if it rested upon him at the beginning, as in a suit upon an accident insurance policy * * *".

"It is contended that it was settled by the Supreme Court in Travelers' Ins. Co. v. McConkey, 127 U. S. 661, that the burden of proof as to suicide in an accident insurance case is on the insurer. In some jurisdictions, this view has been reluctantly given effect: (New York Life Ins. Co. v. Ross, 30 Fed. 2d, 80). In other cases it has been ignored. (Citing many cases in Note 4, page 729). The case, therefore, has not uniformly been recognized as binding authority for the rule that the burden of proof is upon the defendant. Moreover, it is generally agreed that in later cases, Agnew v. U. S. 165 U. S. 36; 17 Sup. Ct. 235, 41 L. Ed. 624, and Holt v. U. S., 218 U. S. 245, 253, 31 Sup. Ct. 2; 54 L. Ed. 1021, the Supreme Court corrected the impression it had given in Coffin v. U. S. 156 U. S. 432, 460; 15 S. Ct. 394, 39 L. Ed. 481, that, in our system of jurisprudence, a presumption of law should be treated as evidence, giving rise to proof to the extent of its efficacy.

"The differences that have arisen as to which party bears the burden of persuasion in insurance cases, when the defense is based on suicide, have been caused in part by a failure to distinguish between cases in which the plaintiff sues on an accident insurance

policy, and cases in which the insurer in a life policy raises the defense of suicide. *If death from any cause except suicide is insured against, the burden is on the company to prove the exception; but if death from one specific cause, such as accident, is insured against, the burden is on the policy-holder to show that the condition precedent to liability has taken place.* Home Benefit Ass'n v. Sargent, 142 U. S. 691, 12 S. Ct. 332; 35 L. Ed. 1160; Parish v. Order of United Commercial Travelers, 232 F. 425; Travelers' Ins. Co. v. Wilkes, 76 F. (2d) 701; Wigmore on Evidence, Sec. 2510 (b), (c)." (Italics supplied.)

(Fifth Circuit):

"It (presumption against suicide) does not regulate nor change the burden of proof, but it is an evidentiary presumption which may aid a lack of evidence, but cannot prevail against the evidence."

Travelers Ins. Co. v. Wilkes, 76 F. (2d) 701, 705;

Fidelity & Casualty Co. v. Driver, 79 Fed. (2d) 713;

New York Life Ins. Co. v. Trimble, 69 F. (2d) 849.

(Tenth Circuit):

In Frankel v. New York Life Ins. Co., 51 F. (2d) 933, the court said:

"Appellant invokes the rule that there is a presumption a death is not due to suicide but to accident, and contends that this, together with the evidence, required a submission of the case to the jury. The presumption is one of law. It is indulged because self-destruction is 'contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' And a party is entitled to the benefit of the presumption, in the absence of evidence respecting the cause of death. Travelers' Insurance

Co. v. McConkey, 127 U. S. 661. But the plaintiff had the burden of proving the fact necessary to establish the liability of the insurance company, and the legal presumption that might aid her could be of value only under circumstances leaving the cause of death in doubt. . . . As was aptly said in Von Crome v. Travelers' Ins. Co. (C. C. A.) 11 Fed. (2d), 350, the legal presumption disappears where there is evidence of suicide. . . ."

(Eighth Circuit):

In Willcuts v. Stoltze, 73 Fed. (2d) 868, 872, the court quoted with approval the following from Wigmore on Evidence, Sec. 2491:

> "It must be kept in mind that the peculiar effect of a presumption of law (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule."

Also: Von Crome v. Travelers' Ins. Co., 11 Fed. (2d) 350; Flannery v. Willcuts, 25 F. (2d) 951.

(Sixth Circuit):

The effect of the presumption against suicide is merely that the plaintiff must recover in the absence of evidence to the contrary.

New York Life Ins. Co. v. Ross, 30 F. (2d) 80; Harrison v. New York Life Ins. Co., 78 Fed. (2d) 421.

(First Circuit):

> "The law presumes that he (the insured) did not kill himself, in the absence of evidence to the contrary. But this presumption disappears and is entitled to little or no weight if the evidence reasonably leads to a contrary conclusion."
>
> Despiau v. United States Casualty Co., 89 Fed. (2d) 43. (Decided Mch. 15, 1937.)

(Former Decisions of the Ninth Circuit):

As we read the following former decisions of the Circuit Court of Appeals of the Ninth Circuit, they are contrary to the holding of that Court in the case at bar.

In the United States Fidelity & Guaranty Co. v. Blum, 270 Fed. 946, the complaint alleged that on January 12, 1917, "the said Samuel Blum died in the City of Seattle, County of King, State of Washington. His death was effected through external, violent and accidental means." The answer denied this allegation, and for an affirmative defense alleged: "That the policy relied upon by the plaintiff expressly excludes from the risks assured death effected through suicide, sane, or insane, or any attempt thereat, and the death of said Blum was effected through suicide or an attempt thereat, and not otherwise."

The Court said:

> "We think it indisputable that, while the plaintiff made out a prima facie case by showing death by external and violent means that the defendant was required to overcome, yet in the end it was incumbent upon the plaintiff to establish by a preponderance of the evidence the fact as alleged by her that death was effected through external, violent and accidental means. This is a burden which the plaintiff could not escape.

"Suicide is the antithesis of death by accidental means, and, of course, if it appears that Blum took his own life, plaintiff cannot recover under the policy. But this does not shift the burden. The clause in the policy requiring that death shall result through accidental means independent of all other causes devolves the burden upon plaintiff that she substantiate this also before recovery can be had. Travelers' Ins. Co. v. McConkey, 127 U. S. 661. * * *

"There is a presumption that death was not suicidal. This is disputable, *but to overcome it, there must be proof of a tendency to establish the fact sufficient for the jury's consideration.*"

In the case of Ariasi v. Orient Ins. Co., 50 Fed (2d) 548, decided by Circuit Judges Rudkin, Wilbur and Sawtelle, the Court cites and specifically follows the decisions of this Court in Western & A. R. R. v. Henderson, 279 U. S. 639, and Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, and holds that these decisions are in accord with the general rule announced by Wigmore on Evidence (2d Ed. 1923), and quotes and approves the language of that author, and also of Jones' Commentaries on Evidence (2d Ed. 1926), and distinctly approves the rule that "A presumption is not evidence, and it has no weight as evidence. It only makes a prima facie case for the party in whose favor it exists. A presumption merely points out the party who has the duty of going forward. The party against whom the presumption operates has the burden of producing satisfactory evidence to rebut the presumption. When this has been done, the presumption becomes inoperative, and is laid aside, and the case proceeds as it would if no presumption had been invoked," citing Colangelo v. Colangelo, 125 A. 285.

In New Amsterdam Casualty Co. v. Breschini, 64 Fed.

(2d) 887, before Circuit Judges Wilbur, Sawtelle, and Mack, the court said, p. 890:

> "The trial court correctly instructed the jury that if the insured committed suicide, or if his death were caused by intentionally jumping from the balcony of the hospital, or if he were caused to jump by reason of insanity caused by disease or illness, the verdict should be for the defendant, *but upon the subject of burden of proof the instruction was that suicide, self-destruction, intentionally inflicted injuries, illness, and disease were affirmative defenses set up by the defendant and the burden was upon the defendant to establish these defenses by a preponderance of the evidence. IN THIS THE COURT WAS IN ERROR.*" (Italics ours.)

Notwithstanding the above quoted language, the Circuit Court of Appeals of the Ninth Circuit in the case at bar says in its opinion:

> "The insurance company contends that three cases from this Circuit: United States Fidelity & Guaranty Co. v. Blum, (CCA-9) 270 Fed. 946; Connecticut Gen. Life Ins. Co. v. Maher (CCA-9) 70 Fed. (2d) 441, and New Amsterdam Casualty Co. v. Breschini (CCA-9) 64 Fed. (2d) 887, have overruled this established doctrine. In no one of these cases was there any instruction to the jury as to the burden of proof. . . . " (335 R.)

(Text Writers):

Thayer, Preliminary Treatise on Evidence, pages 314, 336, 337, 339;

Wigmore on Evidence, 2nd Ed. 1923, Vol. 5, Secs. 2487-2498, and Chap. 88;

Jones' Commentaries on Evidence (2nd Ed. 1926), Secs. 30, 256.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, commanding the Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court according to law; and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court,—and for such further relief as may seem proper.

And counsel for petitioner hereby certify that the foregoing petition is well founded, and is not interposed for delay.

Respectfully submitted,

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BRIEF.

STATEMENT OF THE CASE

In addition to the facts set forth in the foregoing petition (and not repeated here at length for the sake of brevity), the following is a concise statement of the pertinent facts in the case:

Petitioner insured the life of decedent for $10,000, and agreed to pay double that amount if death resulted solely through external, violent and accidental means, but not as a result of suicide, sane or insane. (9-10-11 R.)

Insured died as the result of a rifle shot wound. The bullet entered his mouth and blew out the back of the head. No other conclusion can be deduced from the admitted facts, but that the gun was in his mouth when fired, and the Circuit Court of Appeals of the Ninth Circuit stated in its first opinion that the evidence leads "irresistibly to the conclusion that the muzzle of the gun was in the mouth of the decedent at the time the rifle was discharged." (76 F. 2d, 544.)

Petitioner tendered the face amount of the policy and demanded full release, which was refused and suit brought for the face amount of the policy plus the double indemnity.

Respondent alleged death was due to the accidental discharge of the rifle, and not by reason of suicide. (6 R.)

Petitioner denied these allegations, and alleged death was due to suicide. (27 R., 30 R.)

Upon the trial, respondent proved death as the result

of a gunshot wound, introduced evidence tending to negative a motive for suicide, and relied on the presumption against suicide to sustain her complaint.

Petitioner produced evidence showing the actual physical facts, which are without material dispute, and from these facts the conclusion is irresistibly drawn that the muzzle of the gun was in the mouth of decedent when discharged, and that no person other than he placed the gun there and discharged it.

At the close of all the evidence, petitioner moved the Court to direct the jury to return its verdict in favor of petitioner on the question of double indemnity, for the reasons: (a) That plaintiff failed to show death was caused by accidental means; (b) that the evidence shows death was caused by self-destruction, and (c) that the evidence will not sustain a verdict in favor of the plaintiff and against the defendant under the double indemnity provision of the policy. This motion was by the court denied, and exception noted (242 R.)

The Court instructed the jury (253-268 R.), over defendant's objection (269-274 R.), in substance, as follows:

1: The burden of proving suicide is on the defendant.

2: The presumption of law is that the death was not voluntary; that this presumption has the weight and effect of evidence, and is binding on the jury and they must find according to the presumption until it is overcome by other evidence, and that the burden of overcoming such presumption rests on defendant.

Verdict was rendered in favor of plaintiff for the full amount, $20,000, and interest, and judgment was entered thereon Nov. 18, 1935. (35-37 R.)

Appeal was taken to the Circuit Court of Appeals of the Ninth Circuit, and error assigned on the ruling of the Court denying defendant's motion for a directed verdict, and upon the instructions of the Court. (288-302 R.)

On June 28, 1937, the opinion of said Circuit Court was rendered and filed (R. 328), sustaining the instructions of the trial court, and sustaining its order denying defendant's motion for a directed verdict, and holding that although "evidence was introduced from which the jury could infer that the special defense of suicide had been established," still the presumption against suicide is to be treated as evidence to the contrary, and is sufficient in itself to sustain the judgment. (329 R.)

Judgment was entered by said Court affirming the judgment of the District Court, and filed and entered June 28, 1937. (344 R.)

Jurisdiction of This Court

is invoked under the provisions of Sec. 240, Judicial Code, Amended; 28 USCA, Sec. 347, providing in substance that

> In any case in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought thereby unrestricted writ of error or appeal.

The opinion of the Circuit Court of Appeals sustaining the instructions and rulings of the District Court, are in conflict with principles established by decisions of this Court, and decisions of other circuit courts of appeal.

The opinion of the Circuit Court admits that it is in conflict with the decisions of the Fifth and Fourth Circuits (341 R.), and claims to be in accord with the decisions of the Sixth and Eighth Circuits, and that its decision is in accord with Travellers' Ins. Co. v. McConkey, 127 U. S. 661, which is controverted by Petitioner.

The following uncontroverted evidence shows that the rifle was in the mouth of decedent when it was discharged, and could not have been accidentally placed there:

Insured was 51 years of age at his death on April 10, 1933 (20 R.); about 5 feet, 10 inches tall, and weighed from 170 to 190 pounds (95 R.; 110 R.); had a wife whom he married in 1908, and a daughter 11 years of age at the time of her father's death (135 R). He owned 5/12th of Gamer's Confectionery Incorporated (70 R.), which business was destroyed by fire in October preceding his death in April (81 R.) He frequently fished and hunted, and was experienced in the handling of firearms, and was always careful with them. (91, 121 R.) He was right-handed (121 R.) On the morning of his death, he had an engagement to meet his friend, Malcolm Gillis, at the Gamer Shoe store (44 R.). He arose about 9 o'clock; came downstairs and ate breakfast with his wife and daughter, and said to his wife, "I think I'll go fishing." He was dressed in clothes which he would wear fishing (136 R.), or would ordinarily wear around the home if he was going to do chores (51

R.). After breakfast, his wife went down-stairs to wash, and heard her husband in conversation with their daughter, engaged in washing and drying the dishes (137 R.). Later, she heard him go upstairs. Some time after she was called to the phone by Mr. Gillis, who wanted to speak to Mr. Gamer concerning their engagement. She started to go to the garage to find him, and the daughter, Elsie, ran up stairs. She heard Elsie scream and came back to see what was the matter. She went up stairs and saw Mr. Gamer's body, and then called for help. (138 R.).

Dr. McHeffey responded to the call. He immediately went to the home and arrived there about 10 minutes to 12 o'clock. No other man preceded him. He went upstairs, and saw the body of Mr. Gamer lying on the floor on its back in the bedroom, with the feet extending into a clothes closet a distance of about 12 inches. The rifle (Plaintiff's Exhibit 1) was resting on the body, with the stock between the feet, and the left hand, at a point about the navel of the body, holding the barrel of the gun just below the muzzle (149-150 R.).

Mr. Con Murphy, the coroner, who later arrived on the scene, also testified that the muzzle of the gun was pointed across the body, and the muzzle held in his left hand, about six inches beneath the sight. (102 R.). He testified: "There is no doubt about him having it (the gun) clasped in his hand. I took his fingers off, and removed the gun from the clasp of his hand." (105 R.). The doctor testified he made an examination of the body at that time before the coroner arrived. He partially turned the body over so he could see the wound in the back of the head, to ascertain whether life was entirely extinct. In the back of the head he found a large

wound,—all bone and soft tissue in the back of the head had been blown out, about 3 to 4 inches in diameter, about the occipital area. He did not move the gun and did not otherwise disturb the body. He then went downstairs and talked with Mrs. Gamer, and when the coroner arrived he and other men went up and viewed the body. He saw a laceration on the left lip of the deceased; it was a clean laceration of the upper lip on the left side; a laceration or tear. He stated the term "tear" might be the better term. There was no part of the lip missing, and no other wound in the front part of the head or face of the deceased. There was a hole in the plastered ceiling of the clothes closet about midway between the north and south wall and about one foot in from the door. He saw blood or matter about the hole, which hole was about the size of a quarter. There was blood and tissue over the closet in the vicinity of the door. There was a cigar butt on the window sill of the closet. He picked up an upper set of false teeth, and a pair of glasses from the floor. The false teeth were not broken, but the glasses were broken through the nose piece. He handed the teeth and glasses to the coroner. He also noticed teeth protruding from the mouth of the body as it lay on the floor. (149-155 R.)

There was one empty shell in the gun; no loaded shell. (88 R.; 97 R.; 106 R.)

Walter Arnold, an architect, made measurements and a map of the clothes closet. (Defendant's Exhibit 3.) This clothes closet adjoins the bedroom on the east. The clothes closet has a width of 2 feet, 3½ inches north and south, and 5 feet, 10½ inches in length. The ceiling of the closet from the floor is 8 feet, 9⅜ inches. There

is a window in the closet opening to the daylight, and it is 2 feet, 3½ inches from the trim on the door entering the closet to the edge of this window, and is 1 foot, 11 inches from the east end of the closet to the trim of the window. There is a 10-inch shelf extending along the north side of the closet, and about the same height as a shelf in the east end of the closet, which is 2 feet, 6 inches from the ceiling. Underneath the shelf to the east is a pole, or hanger rod, extending north and south. There are nine clothes hooks about an even distance apart along the north side of the closet, about 6 feet, 2 inches from the floor. There are four clothes hooks on the south side of the closet, on the west side of the window, which is just as you enter the closet. (141-143 R.)

Clothing was hanging on the hangers in the back of the closet; that is, at the east end of the closet. On the north wall of the closet, there were some hooks, and a few clothes were hanging there. On the south wall of the closet, there was very little if any clothing. (122 R.) These clothes were hanging down loose. (47-48 R.) There was also a box of shoes on the shelf on the north side. There was also a shotgun case in the closet about 2 or 2½ feet in length standing up in the southeast corner. There was a cylinder fishing pole container in the same corner, and a robe on the floor. There was also some old clothes, consisting of a pair of pants, coarse socks and a pair of shoes, tossed in. (122-123 R.) On the shelf was a loaded Colt .22 automatic pistol. (122 R.)

The undertakers, who washed and prepared the body for burial, testified in detail as to the wound upon the body, as follows: On the upper left lip, about one-eighth of an inch in from the corner of the mouth, was

a tear about half an inch long, extending upward toward the nose. The lip was torn through, with the exception of being held together in the center with a muscle fiber. (145 R.) Upon being sewed, the edges of this tear came together perfectly. There was no part of the lop missing.

There was no other wound upon the outside face of the body of Walter Gamer. (146 R.)

This wound on the lip did not appear to have been made with a knife. The edges were a little ragged. Three or four stitches were put in it. There was no missing skin and the wound came together normally. There was no evidence of a bullet wound through any portion of this laceration. (62 R.)

There was no other laceration or abrasion on the face of the deceased. (64 R.)

There were no bullet wounds or holes in the chin; nor in either side of the face; nor in the ear or eye, or nostrils. There was no bullet wound in any portion of the head, save and except the wound in the back of the head. (66 R.)

That portion of the back of the head, about the point of the occipital area of the skull, was blown out, to a diameter of about 3½ inches. (60 R.; 147 R.)

Mr. Gamer had no natural upper teeth. The plate found in the clothes closet by Dr. HcHeffey, and by him given to the undertaker, was placed in the mouth upon preparing the body for burial and fitted perfectly.

There was no portion of the gum torn. These upper teeth were not broken in any way. (146 R.; 62 R.)

The undertaker (Hanley) testified that at the home he noticed "the lower plate of teeth turned over and protruded outward." (60 R.) He further testified: "There

was no lower plate of false teeth, but there was bridge work. His lower teeth were his normal teeth, his own teeth. He had, I would say, about six, and it was bridge work from there back on each side of the six in the lower jaw. These two sides of artificial teeth on each side of the natural teeth were braced onto the lower teeth on each side and then braced across behind his own teeth. That brace is a form of reinforcemnt of wire, or maybe silver. At the time I saw the body of Mr. Gamer, the edge of this lower plate that I have just described was sticking just even with his mouth, out, with the teeth turned over, outward." (57-58, 146 R.)

The undertaker (Mr. Jordan) also testified: "When I first saw the body, the condition of this bridge work was such that the bridge had turned upside down and a portion of it was protruding out of the mouth,—I noticed that at the home and also at the mortuary." (147 R.)

There was no laceration or wound in the upper gum. (147 R.)

The bridge work was replaced in the mouth and fitted perfectly. (147 R.) But the reinforcement of these lower teeth broke at the adge when it was pressed back. (64 R.)

Mr. Gamer had six lower anterior teeth; they were two lower cuspids, right and left, and four incisors, and in common parlance would be the six teeth in his lower jaw immediately over the chin. He had no other natural teeth. He had an upper false plate, in which were fourteen teeth. They were composed of cellose material, a composition material which is a very hard substance. The upper plate was held in his mouth by suction; they were not fastened to anything. He had a partial removal

appliance of teeth in his lower jaw. There were two cast plates, very rigid, made of gold or composition, fastened to the lower cuspids. (Dr. Roberts, 171-2 R.)

There were three fractures of the lower jaw. These fractures were located on the right side in the middle of the lower jaw; one about the middle of the right side of the face; one below the right-hand corner of the mouth, and the third about the center of the chin. (65 R.) There was no outside wound visible; they were not compound fractures. (148 R.)

There were no powder burns upon the face. (148 R., 66 R.)

The length of the entire gun is 43¼ inches, and from the trigger to the end of the barrel measures 30¼ inches. (143 R.)

SPECIFICATION OF ASSIGNED ERRORS, HERE URGED.

1: The Circuit Court of Appeals erred in sustaining the ruling of the District Court overruling and denying the motion of defendant, New York Life Insurance Company, for a directed verdict against plaintiff and in favor of defendant upon the question of double indemnity, for that the plaintiff failed to show that the death of E. Walter Gamer was caused by any accidental means; that the evidence shows that the death of E. Walter Gamer was caused by self-destruction; and the evidence will not sustain a verdict in favor of plaintiff and against defendant under the double indemnity provision of the policy. (Motion, Order Denying Same, and Exception, R. 242. Assigned Error 288 R.)

2: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"In this case, the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight, of the evidence is upon the defendant. The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary." (Instruction 257 R.; Exception 269-274 R.; Assigned Error 293 R.)

3: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"Ordinarily, gentlemen of the jury, in the absence of a plea by the defendant of suicide or self-destruction, the burden would be upon, and it still is upon the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer in this case the New York Life Insurance Company has admitted that Walter Gamer died through external and violent means. So that question is out. The question remains as to whether the death was accidentally caused, or the means of death was accidental, or whether it was suicide. But when the defendant took the position that it takes here, it assumed the burden of proving to you by a preponderance of the evidence that Walter Gamer killed himself voluntarily. Not that the rifle was in his hand at the time the bullet was discharged; not that it is possible that the bullet might have been discharged by accident, but they must show if they would avoid recovery here, to your satisfaction and by a preponderance of the

evidence that Walter Gamer intentionally took his own life; not that he took it, but that at the time it was taken by him he intended to kill himself. Proof that Walter Gamer had the gun in his hand, proof that as a result of the firing of that rifle he died, is not sufficient to sustain the defendant's contention. In addition to that it must be shown that at that moment Walter Gamer intended that the bullet fired from that gun should take his life." (Instruction 258 R.; Exception 269-274 R.; Assigned Error 293-294 R.)

4: The Circuit Court of Appeals erred in sustaining the District Courts instruction to the jury as follows:

"The presumption of law is that the death was not voluntary, and the defendant in order to sustain the issue of suicide on the part of E. Walter Gamer must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary." (Instruction 259 R.; Exception 269-274 R.; Assigned Error 295 R.)

5: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"Now, gentlemen of the jury, it seems to me that with this single issue presented here we come down to a single point and that is whether the evidence is sufficient to justify you in finding that Walter Gamer deliberately took his own life. As I told you in the beginning, the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you, that the presumption is not according to the fact.

The rule is, as a matter of law, that even where, as in this case, there is direct evidence that the death was caused by a weapon in the hands of the deceased, the presumption against suicide still prevails, because if nothing more than that is shown there is still room for the hypothesis that his act in that regard may have been involuntary, and accidental. So, as I told you, the fact that Walter Gamer may, in your opinion, have had that gun in his hand, the fact that he may have been careless with it,—if we were not careless there would be no accidents. Carelessness is not a defense. There must be a deliberately formed intention on the part of Walter Gamer to kill himself. That is the only possible defense that the defendant in this case has under the pleadings and the proof." (Instruction 263 R.; exception 269-274 R.; Assigned Error 296-7 R.)

6: The Circuit Court of Appeals erred in sustaining the District Court's instruction to the jury as follows:

"In conclusion, the question simmers down to simply this: Do you believe, after considering all the testimony in this case, that Walter Gamer deliberately destroyed himself? If you do, your verdict should be for the defendant so far as the double indemnity is concerned. If, on the other hand, the defendant has not removed from your mind the presumption which the law creates that Walter Gamer did not kill himself, then you should find your verdict for the plaintiff here for the full amount she claims, $20,000.00, with interest." (Instruction 268 R.; Exception 269-274 R.; Assigned Error 301 R.)

ARGUMENT

Specification of Error No. 1.

The Physical Facts Show Suicide.

There were no powder burns upon the face. The gun will show powder burns at a distance of at least 10 inches. Clyde McNeil, a ballistic expert, testified that he made experiments with this gun, delivered to him by counsel for the plaintiff for such purpose prior to the first trial of this case, and in making these tests he fired 12 or 14 shots, using a piece of paper as a target. He fired the gun holding the muzzle 1 inch from the paper; then 2 inches from the paper, and so on, adding 1 inch to the distance until he had fired 12 to 14 shots. He had powder burns on the paper at a distance of 10 inches, and more. (205-6 R.)

Mr. Gamer was right-handed, and the gun was clasped in his *left* hand about six inches below the sight. This demonstrates that he held the gun with his left hand at the time it was discharged. And it also demonstrates that the butt of the gun was on the floor when he fired the shot, otherwise the recoil of the gun would have kicked or dislodged it from his grasp. Mr. McNeil, the firearms expert, testified (and all who have used a gun of that calibre know), that if the gun had been held in the hand without being braced against anything, the recoil of the gun would have jerked it out of his hand. (219 R.) The gun has a weight of approximately 7¼ pounds. (211 R.)

The feet of Mr. Gamer were about 12 inches, or up to his knees, in the closet. (46 R.; 95 R.; 102 R.; 111 R.; 149 R.) The bullet hole in the plastered ceiling was about one foot east of the door in the closet, and about midway between the north and south walls of the closet, which shows that the gun was fired at approximately a right angle to the floor of the closet. The ceiling of the closet from the floor thereof was 8 feet, 9⅜ inches. (242 R.) The back of the head "about two inches above the neck" for a diameter of about 3½ inches, was blown out. (147 R.) The velocity of the bullet at the muzzle was 2700 feet per second. (205 R.) The deflection of the bullet after passing out of Mr. Gamer's head would not be more than 2 or 3 inches at the most. (233 R.) The gun is 43¼ inches in length. (143 R.) If Mr. Gamer was leaning over the gun when the shot was fired, the force of its explosion would tend to throw his body backwards (211 R.; 233 R.); and the fact that the butt of the gun was on the floor, while being fired in this position, would lessen the effect of the recoil. (219 R.)

The deceased was always careful with a gun (91 R.; 121 R.) There is a safety catch immediately back of the trigger, which when pressed forward locks the mechanism so that the gun cannot be fired; it is "safe." (200 R.) The trigger pull is 3½ pounds. (202 R.) There is a guard extending entirely about the trigger, and the gun is hammerless. (See Plaintiff's Exhibit 1.) The clothes in the closet were hanging loosely on hangers. (47-48 R.; 122 R.) There was some wearing apparel on the floor, tossed in. (122-123 R.) There was only one shell in the gun; none left in the magazine. (88 R.;

97 R.; 106 R.) The deceased kept his shells for this rifle in a drawer in the bedroom. (98 R.)

Walter Gamer had 6 lower anterior teeth; being two lower cuspids, right and left, and four incisors, being the six teeth in his lower jaw immediately over the chin. He had no other natural teeth.

He had an upper false plate, in which there were 14 teeth, composed of cellose material, a composition material which is a very hard substance. The plate was held in his mouth by suction; it was not fastened to anything. (171 R.)

He had a partial removal appliance of teeth in his lower jaw, consisting of two cast plates, very rigid, made of gold or composition, fastened to the lower cuspids. (171-2 R.)

The upper false teeth and his glasses were found on the floor of the closet. (153-4 R.)

One of two possible theories must be true: Mr. Gamer either took his upper set of teeth out of his mouth, or they were blown out by the force of the explosion. If he took them out, he tossed them in the closet, and did so for the purpose of placing the gun in his mouth before firing the shot. If they were blown out, then he could not have accidentally inserted the gun in his mouth without injuring these teeth or his lips or gums.

The opinion of Dr. Roberts was that the explosion of the gun in his mouth would have broken the teeth (175 R.), altho the denture was made of a very tough substance. (173 R.)

When the body was found, the lower bridge work was turned upside down and a portion of it was protruding from his mouth. (147 R.; 60 R.) The edge of

the lower plate was sticking even with his mouth, out, with the teeth turned over, outward. (57-58 R.; 146 R.)

There was no wound on the face, except a tear about one-half inch in length, commencing in the upper left lip about one-eighth of an inch from the corner of his mouth, and extending upward toward the nose. (145 R.) It was practically a complete split, but not such that you could take it apart, because it was held by a muscle fibre; the upper portion of the lip was held together by a muscle fibre, but both the outside and inside tissue was split,—the center being held together with a muscle fibre. (63 R.; 145 R.) Upon being sewed the edges came together perfectly; no part of the lip was missing; the edges of the tear were a little ragged, but there was no missing skin, and no evidence of a bullet wound through any portion of this laceration. (62 R.) In the opinion of Dr. Shields, it could not be a bullet wound (181 R.), but was due to stretching of the lip; it was a tear. (187-188 R.) In the opinion of Dr. Kistler (an experienced physician, surgeon and rifle expert) it could not be a bullet wound (230 R.), and might be from the sight of the gun. (235 R.) Further, there was no injury to the gums, either upper or lower. (146 R.)

The lower jaw was broken in three places. The breaks were simple fractures on the right side,—one about the middle of the right side; one below the right-hand corner of the mouth, and one about the center of the chin. (65 R.) In the opinion of Dr. Shields, the explosion of the gun within the mouth would snap the lower jaw down with such force that it would break. (192-193 R.) This was also the opinion of Dr. Kistler (231 R.), and of Clyde McNeil, a ballistic expert. (209 R.) And it

was the opinion of Dr. Shields that if the muzzle of the gun was posterior to the teeth, the explosive force within the mouth would force the teeth out. (190 R.) This was also the opinion of Dr. Kistler (230 R.), and of Mr. McNeil. (208 R.)

The muzzle energy of the gun was 2430 foot pounds (205 R.). Such a force exerted instantaneously within the confines of a human mouth would blow the mouth open, which would have the effect of snapping down the lower jaw, it being hinged and loose and the upper one being a part of the skull, and would at the same time exert a terrific expanding or stretching force within the mouth, which might cause the lip to tear and give way, and the muscle tissue, which more easily gives, would be the last to break, thus tearing the flesh of the lip inside and outside and leaving the muscle tissue between. (187-188 R.)

The gun was therefore within the mouth of Walter Gamer when he fired the shot which ended his life. This appears to be conceded throughout the trial by all persons, except the trial judge. (298 R.)

And the Circuit Court of Appeals on the first appeal of this case (76 F. 2d, 544), states that the facts lead "irresistibly to the conclusion that the muzzle of the gun was in the mouth of the deceased at the time the rifle was discharged." And the same Court on the last appeal states, "The facts proved are not in their essence different from those presented to us on the former appeal." (328 R.)

The conclusion is just as certain that the muzzle of the gun was posterior to the teeth, otherwise the lower

set of bridge work could not have been forced outward. (190 R.)

It is also certain that the butt of the gun was held against the floor by Mr. Gamer when he fired the shot, otherwise the recoil of the gun, with its light weight, would have dislodged the gun from his hand, and it was found clasped in his hand.

It would not only be improbable but impossible to get the gun in the mouth in this manner by accidental means.

The moist cigar stub was placed on the window sill of the clothes closet, near the middle of the closet on the right side as you enter the closet. The cigar was "moist" when Merle Davis felt it. (120 R.) Why did he take the cigar stub out of his mouth and place it on the window sill of the closet? Certainly not by accident, but by design.

Every fact and circumstance above outlined and shown by the record is consistent with the theory of suicide and inconsistent with accident.

There is not one particle of evidence in the record upon which death by accident can be predicated. There is nothing to show that the gun could have been discharged except by design under the circumstances.

None of the foregoing evidentiary facts are contradicted, and none of the testimony of the Doctors and Experts is attempted to be disputed upon the record.

The plaintiff rested her case entirely on the presumption against suicide, and evidence tending to show a lack of motive. It is our contention that the presumption disappeared in the light of the evidence produced, as will be more fully discussed later in this brief.

It Is Unnecessary to Show Motive.

"Motive is helpful but is not essential. This is so because in this life men who have no apparent motive for it do commit suicide. Perhaps always in the case of a sane person who commits suicide there is a motive; but in many cases the motive is not and could not be proven."

New York Life Ins. Co. v. Trimble (CCA-5th) 69 F. (2d) 849, 851;

Aetna Life Ins. Co. v. Tooley (CCA-5th) 16 F. (2d) 243, 244;

Burkett v. New York Life Ins. Co., (CCA 5th), 56 F. (2d) 105, 107-8.

But the record shows that Mr.. Gamer owned 5/12th of the capital stock of Gamer's Confectionery Incorporated (69-70 R.), with a paid-in capital of $50,000. (75 R.) During the year 1932, he had a gross income of $11,493.43, and a net income of $10,443.95. Of this amount $4,166.85 was salary from this company, and $7,500 dividends from this company, and $31.97 dividends from other sources. (73 R.) The business was destroyed by fire in October, 1932. (72 R.) During the year 1932, he paid in interest $882.69. (74 R.) His gross income from January 1, 1933, to April 10 (the date of his death), was $1,863.38, of which $300 was salary, and $1,563.38 dividends from Gamer's Confectionery.

On April 24, 1933, the assets of Gamer's Confectionery Incorporated were as follows:

Bank Balance,	$10,394.57
50 shares First Bank Stock,	500.00
Notes Receivable,	144.99
Accounts Receivable,	449.88
Salvage in Furniture Fixtures and Equipment,	5,900.00
Salvaged Groceries, about,	500.00
Total Assets (71-72 R.),	$17,889.44
Indebtedness, approximately,	1,100.00
Net Worth of Gamer's Confectionery, after fire,	$16,789.44 (R 72)
of which Walter Gamer owned 5/12th, or	$ 6,995.60

The destruction of the business in 1932 cost him dividends from the business of $7,500, a yearly salary of over $4,000, and reduced the capital assets of the concern to $16,789.44. (74 R.) His only asset as shown by the record was his interest in this partially destroyed business, amounting to $6,995.60. As against this, he had paid interest as shown by his income tax return for 1932 of $882.69, but the record fails to show the amount of the debt or the rate of interest paid. The witness did not know. However, counsel for defendant asked that it be capitalized on the basis of 6%, the legal rate of interest in Montana, which would show that he owed $14,711.50, upon which he was paying interest, and therefore the record discloses that he was at the time of his death worth $7,715.90 less than nothing. (67-78 R.)

The above is shown by the testimony of Roscoe Thomas, who was called as a witness by plaintiff for the stated purpose of "showing the financial condition of the deceased" (68 R.), and it is to be presumed that the plaintiff put forth the best evidence available for such purpose, and made her case as favorable as possible. Plaintiff did not in any way seek to modify or change the effect of this evidence.

This may have been such a mental worry as to cause or contribute to his rash act.

Surmise or Conjecture Will Not Sustain a Judgment.

> Before there can be any room for a reasonable hypothesis of death by accident, there must be some facts and circumstances that would so indicate.
>
> Penn. Ry. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;
>
> New York Life Ins. Co. v. Anderson (8th CCA) 66 F. (2d) 705, 709;
>
> Frankel v. New York Life Ins. Co. (10th CCA) 51 F. (2d) 933, 935;
>
> Aetna Life Ins. Co., v. Tooley (5th CCA) 16 F. (2d) 243, 245;
>
> New York Life Ins. Co. v. Alman (5th CCA) 22 F. (2d) 98, 101;
>
> Burkett v. New York Life Ins. Co., (5th CCA) 56 F. (2d) 105, 108;
>
> Stevens v. White City, 285 U. S. 195, 52 S. Ct. 347, 350, 76 L. Ed. 699.

In the case at bar there is no evidence to show death by accident. What was the accident? How did it happen? As to whether an accident happened or not, is entirely surmise and guess.

On the other hand, the physical facts in the case point unerringly to self destruction. They are all consistent with suicide, and inconsistent with any other theory.

The District Court Should Have Sustained the Motion for a Directed Verdict.

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'"

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720;

Delk v. St. Louis, etc., Co., 220 U. S. 580, 31 S. Ct. 617, 620, 621, 55 L. Ed. 590;

United States v. Spaulding, 293 U. S. 498, 55 S. Ct. 273, 79 L. Ed. 617.

Specifications of Error Nos. 2, 3, 4, 5 and 6.

These specifications all relate, either singly or collectively, to errors of the Court in sustaining instructions to the jury that (a) the burden of proving suicide is on the defendant; and (b) that the presumption of law is that death was not voluntary; that this presumption has the weight and effect of evidence, and is binding on the jury and they must find according to the presumption until it is overcome by other evidence, and that the

burden of overcoming such presumption is on defendant,—and will therefore be discussed together under these subdivisions.

(A) *The Circuit Court of Appeals Erred in Sustaining the Instructions to the Jury that the Burden of Proving Suicide is on Defendant.*

The District Court, by the Instructions here assigned as error, instructed the jury, and the Circuit Court of Appeals affirmed the instructions, that the burden of proving suicide is on the defendant, and apparently did so because the defendant denied accidental death and alleged self-destruction.

The only issue is as to the double indemnity. The policy provides for double indemnity "upon receipt of due proof that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means. . . . . Double indemnity shall not be payable if the insured's death resulted from self-destruction, whether sane or insane." (9-10-11 R.)

The complaint alleges that the death of the insured "resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and . . . . that the death of said insured *did not result from self-destruction* (but) resulted directly from the accidental discharge of a firearm, to-wit: a rifle. . . .". (6 R.)

The answer denies that the death of insured resulted from the accidental discharge of a rifle, and alleges that the death of the insured resulted from self-destruction. (27 R., 30 R.)

It is to be borne in mind that this is not a suit for

death, but for *death by accident.* The defendant at all times offered to pay the *death* claim, and tendered the money in exchange for a full release, which was refused. (195-196 R.)

The burden is upon the plaintiff to prove her cause of action, "death by accident," which proof would negative death by intention.

In the case of United State Fidelity & Guaranty Co. v. Blum (9th CCA), 270 Fed. 946, the plaintiff alleged that "death was effected through external, violent, and accidental means." The answer denied this allegation, and alleged that "death of the insured was effected through suicide, and not otherwise." The court held that "suicide is the antithesis of death by accidental means" and the burden was upon the plaintiff to show death by accidental means before she would be entitled to recover.

In the case of Travelers' Ins. Co. v. Wilkes (CCA 5th), 76 F. (2d) 701, under a like contract, and where the defendant had denied accidental death and plead suicide, the Court said:

> "The court correctly told the jury that the burden was upon the plaintiff to show that death was directly and independently of all other causes the result of accidental means, and that the burden of establishing an accidental death was upon her and remained with her throughout the case. At the same time, more than once and against requested charges to the contrary and over exceptions taken, the jury were told that the defense of suicide was an affirmative defense and the burden of establishing it by a preponderance of the evidence was upon the defendant. The latter charge would be correct in a suit upon the usual life policy containing an *exception* of death by suicide, for then the plaintiff need prove only death;

the insurer having to plead and prove the exception. But this policy promises payment *not for death, but for death by accident.* Suicide, at least when sane, is not accidental death. A plaintiff under this policy has the burden of proving an *accidental death, thereby negativing suicide.* The denial that the death was accidental was a sufficient plea. *The additional plea that it was suicide, though more specific, really added no defensive merit. It was not the setting up of an exception from the policy, but a denial that the death was of the sort insured against. The burden of proof remained on the plaintiff.* New York Life Ins. Co. v. Anderson (CCA) 66 F. (2d) 705; New Amsterdam Casualty Co. v. Breschini (CCA) 64 F. (2d) 887; Mutual Life Insurance Co. v. Gregg (CCA) 32 F. (2d) 567; United States Fidelity & Guaranty Co. v. Blum (CCA) 270 Fed. 946." (Italics Supplied.)

The case of International Life Ins. Co. v. Carroll (CCA 6th) 17 F. (2d) 42, 43, quoted by the Circuit Court of Appeals in the case at bar as sustaining its holding that the burden of proving suicide is upon the defendant (334 R.), is not in point here because the policy sued on was payable on proof of death, except that death by suicide terminated the policy and fixed the liability thereunder at a sum equal to the first year's premium. In that case, the contract provided for payment upon proof of death, except suicide. Of course, the burden of pleading and proving this exception rested with the defendant.

One of the most learned and instructive cases upon all questions here presented to be found in the books is the recent case of Jefferson Standard Life Ins. Co. v. Clemmer (CCA 4th), 79 Fed. (2d) 724. Therein that Court concerning this question says at page 732:

"Of course if the plaintiff foregoes his claim for double indemnity, and limits the suit to a single

liability, the burden of persuasion is on the company; and, on the other hand, if the company admits single liability and the contest is over the double indemnity, the burden of persuasion is on the plaintiff."

Federal Life Ins. Co. v. Zebec (CCA 7th) 82 F. (2d) 961, 963.

In the case of New Amsterdam Casualty Co. v. Breschini (CCA 9th), 64 F. (2d) 887, 890, the Court, speaking through Circuit Judge Wilbur, says:

"The trial court correctly instructed the jury that if the insured committed suicide, or if his death were caused by intentionally jumping from the balcony of the hospital, or if he were caused to jump by reason of insanity caused by disease or illness, the verdict should be for the defendant, *but upon the subject of burden of proof the instruction was that suicide, self-destruction, intentionally inflicted injuries, illness, and disease were affirmative defenses set up by the defendant and the burden was upon the defendant to establish these defenses by a preponderance of the evidence. In this the court was in error.*" (Italics supplied.)

In the case of Fidelity & Casualty Co. of New York v. Driver, (CCA 5th), 79 F. (2d), 713, 714, the Court says:

"The serious error lies in putting the burden on the defendant to show that the death was not accidental, but suicidal, in a suit on an accident policy. The plaintiff under such a policy can recover only on proof of death by accident as set forth in the policy. *A contention by the insurer that there was suicide is not the assertion of an exception which he has the burden of pleading and proving, but is only another way of saying that the death was not accidental.*"

But the Circuit Court bases its opinion in the case at bar primarily upon the case of Travelers' Insurance Company v. McConkey, 127 U. S. 661, and holds that case is authority for its decision that the burden is on the plaintiff to prove death by accident, and on the defendant to prove death by suicide.

It seems clear that if the plaintiff must show death by accident, it must negative death by intentional means, such as suicide; and if the defendant must prove death by suicide, it must likewise negative death by accident.

We do not believe the decision in the McConkey case is open to any such interpretation or construction.

This Court in that case clearly says:

> "There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means." (Page 666.)

The Court then says:

> "If he committed suicide, then the law was for the company, because the policy by its terms did not extend to or cover self-destruction, whether the insured was at the time sane or insane. In respect to the issue as to suicide, the court instructed the jury that self-destruction *was not to be presumed*, but 'the *presumption is against the latter*. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless the presumption was overcome by competent evidence? This question must be answered in the negative. . . . "

> "*Upon the whole case,* the court is of the opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external, violent and accidental means; also, that no valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death."

To our minds, this case clearly means that the burden is on the plaintiff to prove his case and show accidental death, or fail. The cause of death being unexplained, a presumption arises in accordance with human experience that it was not caused by suicide, and this presumption temporarily aided the plaintiff on whom was the burden of persuasion. This required the defendant to go forward with its evidence, or the issue of suicide would go against it, but did not place the burden on defendant of proving suicide, or change the burden of proof resting on the plaintiff.

There is nothing in the McConkey case which holds that this presumption against suicide has the force or effect of evidence, or is to be considered by the court or jury after evidence is received tending to explain the cause of death.

As was said by this Court in the case of Mobile v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78,—"The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When this is done, the inference is at an end."

Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 53 S. Ct., 249, 77 L. Ed. 457.

However, the proper construction and interpretation to be placed upon the McConkey case has given rise to much contrariety of opinion.

See: Jefferson Standard Life Ins. Co. v. Clemmer, 79 Fed. (2d) 724, at page 731, column one.

(B) *The Circuit Court of Appeals Erred in Sustaining the Instructions to the Jury that the Presumption of Law is that the Death was not Voluntary; that this Presumption has the Weight and Effect of Evidence, and is Binding on the Jury and they Must Find According to the Presumption until it is Overcome by Evidence, and that the Burden of Overcoming such Presumption is on the Defendant.*

These questions are answered by this Court, contrary to the ruling of the Circuit Court of Appeals in the case at bar, in the following cases:

Mobile v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78;

Western & A. R. R. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884;

Heiner, Collector, v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772;

Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 53 S. Ct. 249, 77 L. Ed. 457;

Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 229.

The Circuit Court of Appeals of the Ninth Circuit misconstrues these cases, and holds that this Court recognizes in these opinions two classes of presumptions, one the "vanishing" type, citing the Turnipseed case, and the other the "permanent" presumption, citing the Henderson case (336-337, 338 R.), and that the

principle to be applied in the case at bar is that of the permanent presumption, citing the McConkey Case. (337 R.)

In other words, altho, as the court states, "evidence was introduced from which the jury could infer that the special defense of suicide had been established," (329 R.), yet the presumption against suicide is a *permanent* presumption in this case, and, as the jury was instructed, has the "weight and effect of evidence and is binding upon you and you must find according to that presumption until it is overcome by evidence that satisfies you that the presumption is not according to the fact." (263 R.; Assigned Error 296 R.)

Under this principle of law, the case was submitted to the jury without any evidence to sustain accidental death, and supported only by a presumption, which the evidence shows is contrary to the truth.

In the Turnipseed case (219 U. S. 35), this Court said:

> "The only legal effect of this inference (presumption of liability created by statute), is to cast upon the railroad company the duty of producing some evidence to the contrary. When this is done, the inference is at an end."

In the Henderson case (279 U. S. 639), this Court said:

> "A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. . . . The Mississippi statute (Turnipseed case) created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. That of Georgia as

> construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by section 2780 (the statute of Georgia under consideration) is unreasonable and arbitrary, and violates the due process clause of the Fourteenth Amendment."

The above language is misconstrued by the Circuit Court of Appeals of the Ninth Circuit into a holding by this Court that it recognizes a permanent presumption as evidence (336-337-338 R.), when the fact is that this Court held the Georgia statute unconstitutional because it was unreasonable and arbitrary in that it "created and inference of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

Following this reasoning, the Court again, in the case of Heiner, Collector, v. Donnan (285 U. S. 312) said:

> "A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof. . . ; and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same."

Again, this Court, in Atlantic Coast Line R. Co. v. Ford (287 U. S. 249, 53 S. Ct. 249), said:

> "True, the jury was not told in so many words that, where countervailing evidence has been put in, the presumption comes to an end, but we think this is the fair purport of the language of the court to the effect that appellants may rebut the presumption by their evidence, and that then all the evidence must be considered in determining the question of proximate cause. *Certainly, the charge contains no affirmative words directing the jury in that event to consider the presumption as evidence to be weighed with other evidence in the case.*"

And the last expression of this Court on the subject is to be found in the case of Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 229, and is as follows:

> "The relevant substantive section of the act directs that no compensation shall be payable if the injury was occasioned by the wilful intention of the employee to injure or kill himself; the adjective section creates a presumption that the injury was not so occasioned, in the absence of substantial evidence to the contrary. *The question is whether, as the court below thought, the presumption has the quality of affirmative evidence. The answer must be that it has not.*" (Italics supplied.) (P. 193.)
>
> "When a trier of facts is to be persuaded of the truth of a disputed proposition, one or the other of the parties, the proponent or the opponent, has the burden of going forward with evidence. In the present instance, the fact that the wound was self-inflicted permits but one of two conclusions; either the decedent accidentally killed himself or he committed suicide. Considerations of fairness and experience in human affairs induce fact-finding bodies, where there is a balance of probability, to adopt a working assumption as the basis of a conclusion, *unless and until facts*

are developed by evidence. The natural love of life . . . . (etc.) justify a presumption, which the law indulges in such a case, that the death was accidental. . . . The employer must rebut this prima facies. . . . Once the employer has carried his burden by offering testimony *sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence. . .* " (P. 193.)

Decisions of Circuit Courts of Appeal.

The case of Jefferson Standard Life Ins. Co. v. Clemmer (CCA 4th), 79 Fed. (2d) 724, is a brief in itself upon these questions, and holds:

That the presumption against suicide is not evidence at all, but a rule of law requiring the conclusion, in the event of an unexplained death by violence, that it was not suicidal, until credible evidence of self-destruction is offered. The presumption then disappears from the case. It simply performs the office of requiring the person seeking to avoid liability on the ground of suicide to go forward with evidence or the issue of suicide will go against him, but if he offers such evidence, the burden of persuading the jury that death resulted from accident independent of suicide and all other causes remains with the plaintiff.

To the same effect are the following cases:

Travelers' Ins. Co. v. Wilkes (CCA 5th), 76 F. (2d) 701, 705;

Fidelity & Casualty Co. v. Driver, (CCA 5th), 79 F. (2d) 713;

New York Life Ins. Co. v. Trimble (CCA 5th), 69 F. (2d) 849;

Frankel v. New York Life Ins. Co. (CCA 10th), 51 F. (2d) 933;

Wilcuts v. Stoltze (CCA 8th), 73 F. (2d) 868, 872;

Von Crome v. Travelers' Ins. Co., (CCA 8th), 11 F. (2d) 350;

Flannery v. Willcuts (CCA 8th), 25 F. (2d) 951;

New York Life Ins. Co. v. Ross (CCA 6th) 30 F. (2d) 80;

Harrison v. New York Life Ins. Co. (CCA 6th) 78 F. (2d) 421;

Despiau v. United States Casualty Co. (CCA 1st) 89 F. (2d) 43.

And as we read the former decisions of the Circuit Court of Appeals of the Ninth Circuit, they likewise sustain the ruling for which we contend:

See Ariasi v. Orient Ins. Co., 50 F. (2d) 548, where that Court cites and specifically follows the decisions of this Court in the Henderson and Turnipseed cases, and holds that these decisions are in accord with the general rule announced by Wigmore on Evidence, and quotes and approves the language of that author, as also Jones' on Evidence, and distinctly approves the rule that:

> "A presumption is not evidence, and it has no weight as evidence. It only makes a prima facie case for the party in whose favor it exists. A presump-

tion merely points out the party who has the duty of going forward. The party against whom the presumption operates has the burden of producing satisfactory evidence to rebut the presumption. When this has been done, the presumption becomes inoperative, and is laid aside, and the case proceeds as it would if no presumption had been invoked."

And it has also been held:

"In suits on accident policies insuring against the risk of death from external, violent, and accidental causes, mere proof of death will not suffice. Plaintiff must prove, too, that death was accidental. The true rule, I think, is that, where plaintiff's proof shows a violent death, and does not show it to have been self-inflicted, his case is prima facie made out, because suicide will not be presumed. When, however, plaintiff's case, as here, conclusively shows death by violence self-inflicted, plaintiff has not discharged her burden unless her proof goes further to show that the circumstances of the self-infliction are at least consistent with the theory of accident. Plaintiff fails here, not because the proof has overcome the presumption against her son's suicide, but because the proof fails to raise any presumption in her favor."

Boggan v. Provident Life & Acc. Co. (CCA 5th), 79 Fed. (2d), 721, 723;

New York Life Ins. Co. v. Trimble (CCA 5th), 69 Fed. (2d), 849, 851.

Text Writers:

Thayer, Preliminary Treatise on Evidence, pages 314, 336, 337, 339;

Wigmore on Evidence, 2nd Ed. 1923, Vol. 5, Secs. 2487—2498, and Chap. 88;

Jones' Commentaries on Evidence (2nd Ed. 1926) Secs. 30, 256.

Conclusion.

It is respectfully submitted that this Honorable Court should correct the rulings of the Circuit Court of Appeals herein complained of, to the end that the cause may be determined in accordance therewith.

Aetna Ins. Co. v. Kennedy (Decided May 17, 1937), 57 S. Ct. 809, 81 L. Ed. 754;

Baltimore & C. Line v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636;

Slocum v. New York Life Ins. Co., 228 U. S. 364, 387, 33 S. Ct. 523, 57 L. Ed. 879.

Respectfully submitted,

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